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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-96

COLONIAL REALTY CORPORATION,

Petitioner,

against

JOHN MACWILLIAMS, JR., JAMES E. BRENNAN and COLONIAL PENN GROUP, INC.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents John MacWilliams, Jr. and James E. Brennan submit this brief in opposition to the petition for a writ of certiorari filed by Colonial Realty Corporation to review the judgment of the Court of Appeals for the Second Circuit entered in this action on March 20, 1975.

Question Presented

Is a corporate officer or director liable under Section 16(b) of the Securities Exchange Act of 1934 (the "Act") for profits derived from a sale of his company's stock on January 1 and a subsequent purchase on June 30, or transactions consummated on similarly paired dates?

Statement of the Case

This action was brought under Section 16(b) of the Act to recover alleged profits received by defendants MacWilliams and Brennan. The district court, granting defendants' motion to dismiss for failure to state a claim, ruled that the transactions referred to in the complaint had not occurred "within any period of less than six months," the statutory period designated in Section 16(b), and that, therefore, no liability attached under that Section. The court of appeals affirmed in a *per curiam* opinion.

The complaint alleges that defendant MacWilliams, while an officer of Colonial Penn Group, Inc. ("CPG"), sold shares of that company's stock on December 20, 1972, and purchased shares on June 19, 1973. It is also alleged that defendant Brennan, while an officer of CPG, sold shares of CPG stock on December 22, 1972, and purchased shares on June 21, 1973.

These transactions were patterned exactly after the rule formulated by the court in *Stella* v. *Graham-Paige Motors Corp.*, 132 F. Supp. 100 (S.D.N.Y. 1955), *remanded on other grounds*, 232 F.2d 299 (2d Cir.), *cert. denied*, 352 U.S. 831 (1956)—a rule which has been universally accepted ever since.*

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* In *Stella* the district court held that "profit realized from a purchase on January 1st and a sale on June 30th would not be recoverable under the statute." 132 F. Supp. at 104.

Reasons for Denying the Writ

I. The Petition Does Not Present Special and Important Reasons for the Exercise of This Court's Discretion to Review on Writ of Certiorari.

The sole question presented for review concerns the computation of a statutory time period. This is simply not a "novel and serious question of statutory interpretation" (Petition, p. 4) which should occupy the time of this Court.

Moreover, the proper computation of the Section 16(b) time period has been settled law since the 1955 decision in *Stella*.

Cutting through the rhetoric and scholasticism in the petition, the salient facts are these:

(1) The *Stella* rule has never been challenged or criticized by any court or commentator.

(2) Every legal research tool that an investor might consult, prominently including Professor Loss' definitive treatise, cites *Stella* as controlling authority.*

(3) Neither Congress nor the Securities and Exchange Commission has taken any action to alter the *Stella* rule nor ever called it into question.

Unlike many cases this Court is asked to consider, there is no issue raised here as to which other courts have reached conflicting conclusions. Every judge who has considered

* See the authorities cited by Judge Gurfein (App. 6a n.1).

the matter has adopted the rule of *Stella*. The Court of Appeals for the Ninth Circuit has approved the rule. *Rheem Manufacturing Co.* v. *Rheem,* 295 F. 2d 473, 475 n.3 (9th Cir. 1961).

Most recently, in direct contradiction to petitioner's assertion (Petition, p. 6) that the *Stella* principle has never been followed, *Stella* was directly and explicitly followed in *Morales* v. *Reading & Bates Offshore Drilling Co.,* 392 F. Supp. 41 (N.D. Okla. 1975). Significantly, the decision in *Morales* nowhere cites the district court decision in the case at bar and is, therefore, an independent reaffirmation of the rule enunciated in *Stella.*

Moreover, the petitioner's assertion that this Court should exercise its power of supervision because the court of appeals abdicated its responsibility to decide this question is frivolous. Of course it decided the question. The sin of which that court stands accused is that of having relied on a 20-year old decision, in its own circuit, which directly confronted and decided a narrow question concerning the computation of a statutory time period. It does not belittle the importance of Section 16(b) to say that enough of our judicial resources have already been spent on this question.

II. The Courts Below Correctly Construed Section 16(b) of the Act.

Notwithstanding petitioner's claim to the contrary, the district court did consider the merits of the rule enunciated in *Stella.* Judge Gurfein explicitly rejected the authorities and analogies offered by the petitioner (App. 6a).

The *Morales* court, though not bound to follow *Stella*, found its reasoning to be "persuasive and dispositive." 392 F. Supp. at 45. A review of Judge Dimock's analysis in *Stella* confirms that his conclusion is the result of careful statutory construction and offends no policy of the Act.

The references to a period of "six months" in the legislative history of the Act and in the cases cited by petitioner occur in contexts in which the precise measurement of the statutory period is not an issue requiring careful resolution; such references are most aptly characterized as loose or shorthand renditions of a statutory phrase which is clumsy to use and repeat *in haec verba*. The interpretation of the statutory language adopted by the courts below, and fully developed in *Stella*, is the only interpretation of Section 16(b) which gives effect to each word of the phrase "within any period of less than six months."

Petitioner is asking this Court to review a settled rule addressed to one of the narrowest and least significant issues that could possibly be raised under the federal securities laws. It seeks the reversal of a technical rule which has been followed by every court which has considered it; which has been accepted by every commentator; which raises no question relating to the policy or purpose of the Act; which both the Congress and the Securities and Exchange Commission have allowed to persist without change; and which, once decided, is best left undisturbed.

Conclusion

The petition for a writ of certiorari to review the judgment of the Second Circuit should be denied.

August 15, 1975

Respectfully submitted,

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